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HARTANAH AP RAKYAT BHD v. UNIVERSAL FRONTIER SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ARIEF EMRAN ARIFIN JC
[CIVIL SUIT NO: WA-22NCVC-488-07-2019]
B 17 APRIL 2023

Abstract – *Parties are bound to a consent judgment that has been perfected and the court has a duty to enforce the terms agreed by the parties. A consent order must rarely be disturbed unless there are exceptional circumstances warranting intervention. The jurisdiction to set aside a consent judgment is not to be exercised as a matter of course but in limited circumstances.*

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D ***CIVIL PROCEDURE:*** *Setting aside – Consent judgment – Application to set aside consent judgment – Whether consent judgment fell within any of categories justifying setting aside – Whether issues could be resolved by way of affidavits – Whether issues raised in support of setting aside application ought to be raised by way of new action – Whether there were exceptional circumstances warranting setting aside*

E ***CIVIL PROCEDURE:*** *Stay – Enforcement – Consent judgment – Application to stay enforcement of consent judgment – Whether there was basis for application – Whether there was pending appeal against said consent judgment – Whether there were special circumstances warranting stay of orders*

F ***CIVIL PROCEDURE:*** *Affidavits – Expungement – Application to expunge affidavit – Whether affidavit relevant document that ought to be admitted into evidence – Whether affidavit fell under any of categories recognised under O. 41 r. 6 of Rules of Court 2012 – Whether affidavit contained matters that were scandalous, irrelevant or oppressive – Whether affidavit ought to be expunged*

G The defendant filed four applications, namely: (i) to set aside the consent judgment dated 18 July 2022 ('encl. 170'); (ii) to stay enforcement of the consent judgment dated 18 July 2022 ('encl. 171'); (iii) to expunge the affidavit affirmed by one Maha Kalithas Pramasamy ('encl. 181'); and (iv) to set aside the consent judgment dated 18 July 2022 ('encl. 208'). The H defendant submitted that it was entitled to set aside the consent order as: (i) cl. 2 of the judgment contravened the Moneylenders Act 1951 ('Act'); (ii) the consent judgment was obtained: (a) without the consent of the principal officer of the defendant who was present in court; (b) under duress; and (c) by the fraudulent action of the plaintiff; (iii) the alleged conduct of I an agent provocateur to stop the defendant from selling the property; and (iv) the consent judgment was entered despite the alleged change in the legal status of the plaintiff.

Held (dismissing applications):

(1) The consent judgment did not fall within any of the categories justifying the setting aside of the order. The consent order was a separate agreement agreed upon between parties to settle the dispute pending before the court. It was not to be confused with the original agreement and the alleged illegality that allegedly tainted the said agreement. The court could not go into whether the said original agreement and the transaction entered between parties was illegal or otherwise. That was ultimately settled between parties and the said issue no longer arose. The court also could not go beyond what had been agreed between parties as it appeared in the consent judgment and allow the defendant to re-argue the issues that have been settled. That category did not fall under the exceptional circumstances justifying the setting aside of a consent order recognised by our superior courts. (paras 9-11)

(2) The issue was whether the late payment charges that were agreed between parties, as stated in item 2 of the order and the other terms of the consent judgment, were illegal according to ss. 10 and 15 of the Act. The evidence adduced before the court did not justify the arguments raised by the defendant. The mere fact that the parties agreed that the defendant was to pay the sums agreed as late payment charges from December 2017 to July 2022 on the principal sum at 5% per annum amounting to RM380,000 did not mean that the terms of the consent order was illegal. The fact that the parties agreed to the terms of the consent order did not prove the existence of any illegal moneylending business as suggested by the defendant. To fall foul of ss. 10 and 15 of the Act, it must be shown that the said consent judgment constituted part of a system and continuity in the business of moneylending. The existence of the agreed late payment charges on its own, as agreed in the consent judgment, did not fall foul of the said provisos. (paras 15-17)

(3) The issues raised by the defendant could not and should not be resolved by affidavits alone and therefore, did not justify setting aside the consent judgment through the notice of applications in encls. 170 and 208. These issues should be raised by way of a new action to impeach the said consent judgment; they could not be raised solely through affidavits alone. They required oral testimony to explain what transpired between the solicitors and the representative of the defendant on the day in question before this court or any court could determine the validity of the allegations. These grounds could only be used successfully to set aside the consent judgment or to impeach it by way of a fresh suit. Furthermore, the allegations, at best, concerned the conduct of the defendant's solicitors and counsel. This would not taint the consent judgment as it was undertaken independently by the solicitors/counsel with the defendant's representatives. These issues did not justify setting aside the consent judgment as they were issues that should be dealt with

A independently at a fresh trial between the defendant and his solicitors/ counsel. The defendant had not shown sufficient evidence or grounds to justify the exercise of the inherent powers of the court to set aside the consent judgment. (paras 25, 29, 30, 32 & 33)

B **(4)** There was no merit in the argument as to the alleged lack of consent put forward by the defendant's solicitors. This argument was untenable to justify setting aside the consent judgment. The defendant was represented at all material times. The affidavits disclosed that the defendant was advised by their chosen solicitors as to the terms of the consent judgment and this was eventually crystallised into a sealed C order. If there were complaints against the firm and counsel, it was for the defendant to institute a fresh action against them for negligence. The consent judgment remained valid as the defendant's solicitors had ostensible authority to bind his client. More so in this case, when the said solicitors had affirmed an affidavit to deny these allegations. D (paras 34, 35, 38 & 39)

(5) The issue of the alleged agent provocateur was an issue that fell outside the ambit of the circumstances justifying the setting aside of the consent judgment. There was no evidence to support the contention that the plaintiff had any connection or relation to the said alleged agent E provocateur or proposed purchasers of the property. (paras 40 & 41)

(6) There was no basis for the defendant's application for the stay of the execution of the consent judgment. At this juncture, the two applications to set aside the consent judgment had been unsuccessful and there was no pending appeal against the said consent judgment. There were also no F special circumstances shown by the defendant to stay the orders that had been agreed upon. (paras 49 & 50)

(7) The affidavit by Maha Kalithas Pramasamy was a relevant document that should be admitted into evidence to consider encls. 170 and 208 which were filed to set aside the consent judgment. As an advocate and G solicitor of the High Court, the deponent had a duty to the court to inform what transpired at the time when the consent judgment was entered. The contents of the affidavit did not contain any privileged information and only answered the averments and allegations made against his firm and counsel attending. He had a right to defend himself H and his firm against the allegations. There was no reason to expunge the said affidavit and the same did not fall under any of the categories recognised under O. 41 r. 6 of the Rules of Court 2012. The affidavit did not contain any matters that were either scandalous, irrelevant or oppressive. The contents of the complained affidavit only touched on I issues that had been raised by the defendant and the new solicitors. The said firm and Mr Maha Kalithas were entitled to rebut these allegations as former solicitors for the defendant and as officers of the court. (paras 44-47)

Case(s) referred to:

Abdul Razak Sheikh Mahmood & Ors v. Amanah Raya Bhd & Ors And Another Appeal [2018] 5 CLJ 273 CA ***(refd)***

Anuar Abd Aziz v. Dato' John Lee Siew Neng & Ors [2023] 3 CLJ 159 CA ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Chow Chuan Fat v. Yeo Chai Seng & Ors [2016] 1 LNS 1407 HC ***(refd)***

David Cheah Seng Chye v. So Miau Song & Ors And Other Appeals [2023] 5 CLJ 20 CA ***(refd)***

In Re Yamamoto Ryoji & Anor; Petitioners [2020] 10 CLJ 75 HC ***(refd)***

Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors [2009] 5 CLJ 1 CA ***(refd)***

Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners) [2000] 3 CLJ 16 CA ***(refd)***

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***

Shinning Crest Sdn Bhd & Ors v. Malaysia Building Society Bhd [2018] 1 LNS 342 HC ***(refd)***

Sureshraj Krishnan v. PV Power Engineering Sdn Bhd & Anor [2022] 1 LNS 2746 CA ***(refd)***

Legislation referred to:

Moneylenders Act 1951, ss. 10, 15, 100A

For the plaintiff - Muhammad Farhan Muhammad Shafee; M/s Shafee & Co
For the defendant - Andrew Sewell; M/s Andrew Sewell
For the 2nd defendant in cross claim - Loke Pooi Gee; M/s L P Gee & Co
Paari Perumal MK Thas & Vasuki Gnanasegaran; M/s Azlan MK Thas

Reported by Najib Tamby

JUDGMENT

Mohd Arief Emran Arifin JC:

Introduction

[1] The defendant has filed four applications for determination by this court. They are as follows:

(i) application to set aside the consent judgment dated 18 July 2022 in encl. 170;

(ii) application to stay enforcement of the consent judgment dated 18 July 2022 in encl. 171;

(iii) application to expunge the affidavit affirmed by Maha Kalithas a/l Pramasamy affirmed on 4 October 2022 in encl. 181; and

(iv) application to set aside the consent judgment dated 18 July 2022 in encl. 208.

Applicable Law On Setting Aside Consent Judgment - Enclosures 170 And 208

[2] It is trite law that a consent judgment is a special type of contract that has a superadded element of being an enforceable command of this court.

[3] I refer to the decision of the Court of Appeal in *Abdul Razak Sheikh Mahmood & Ors v. Amanah Raya Bhd & Ors And Another Appeal* [2018] 5 CLJ 273 where David Wong Dak Wah JCA stated:

> the law on setting aside consent judgment is more than settled and it is this. A consent judgment is only recorded when the respective litigants had agreed in writing as to how to resolve a legal suit. Once the consent judgment had been perfected, the parties are bound by it and the court is duty-bound to enforce the agreed terms of the same. The court also cannot vary any of the agreed terms unless with the mutual consent of the parties. Hence, one can say that the court is *functus officio* or in other words, the court is bereft of jurisdiction to entertain any request to set aside such judgment.

[4] I am grateful that my learned sister, Justice Hayatul Akmal had the opportunity to elucidate the applicable law in this area and summarised as follows in *In Re Yamamoto Ryoji & Anor; Petitioners* [2020] 10 CLJ 75:

> [14] The law on setting aside consent order and/or variation of such order is legally settled:
>
> (i) Once the consent judgment had been perfected, the parties are bound by it and the court is duty-bound to enforce the agreed terms between the parties.
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> (ii) There are a plethora of authorities that hold a consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court.
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> (iii) The burden is on the applicant to prove on the balance of probabilities that exceptional circumstances are present to justify the court's intervention (see *Ng Say Chuan v. Lim Szu Ling* (*supra*); *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 2 CLJ 185; [1996] 1 AMR 909; [1996] 1 MLJ 761 SC; *Badiaddin v. Arab Malaysian Finance Berhad* (*supra*).
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> (iv) The Court of Appeal in *Macquarie (Malaysia) Sdn Bhd v. HSBC Bank Malaysia Bhd & Anor And Another Appeal* [2007] 6 CLJ 176; [2007] 6 AMR 188 CA; [2007] 7 MLJ 139 CA, in consonance with the findings of *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143, FC; *Badiaddin v. Arab Malaysian Finance Berhad* (*supra*) and *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia & Ors (Intervenors)* [2003] 1 CLJ 465; [2003] 1 AMR 439; [2003] 1 MLJ 251; *Chow Chuan Fat v. Yeo Chai Seng & Ors* [2016] 1 LNS 1407; [2017] 1 AMR 676; that the jurisdiction to set aside such a judgment is not to be exercised as a matter of course but in limited circumstances. It is only to be used where:

(a) Breach of the rules of natural justice;

(b) Lack of jurisdiction;

(c) Illegality, *ie*, contravention of a substantive statutory provision;

(d) Serious defects; or

(e) Fraud.

The burden lies on the applicant to satisfy the court that the matter comes within any of the ambit of those aforesaid circumstances.

(v) As for the issue of delay in complying with O. 42 r. 13 RC 2012 (setting aside/varying judgment and orders), the Federal Court had suggested that delay is never fatal in cases where the judgment obtained in irregular as to render it a nullity (see *Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 AMR 215; [1996] 1 MLJ 30 FC; *Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd* [2005] 4 CLJ 345; [2006] 6 AMR 105; [2006] 5 MLJ 21 FC); time is not a bar to an application to set aside a judgment that is so fundamentally flawed and/or illegally and/or irregularly obtained. This is further amplified in the Court of Appeal ruling in *Teoh Ah Mooi v. Causeway Bay Plantations Sdn Bhd* [2014] 5 CLJ 466; [2014] 1 MLJ 263, CA; that where an order of the court is a nullity, an application can be made to set it aside at any time. Judgment in default obtained 12 years prior was set aside as being a nullity (see also *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37, FC).

(vi) In *Lagenda Kencana Sdn Bhd v. Peter's Holding Sdn Bhd & Anor* [2012] 3 CLJ 824, CA; the Court of Appeal ruled that the issue of grave injustice is an important consideration in an application to set aside a consent order. If it can be shown that the said judgment/order had caused grave injustice to the aggrieved party, then such judgment/order may be set aside.

(vii) The legal position is settled that where an order of the court has not been regularly obtained, any party is entitled as of right to have it set aside, *ie*, *ex debito justitiae*, irrespective of the merits and without any terms. Such power of court is inherent and need not be derived from any statutory provision.

[5] I also refer to the decision of Siti Norma Yaakob JCA in *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners)* [2000] 3 CLJ 16:

> Despite the above restrictions, an aggrieved party can still impeach a regularly drawn up order but only in a fresh suit brought to attack the order on the grounds that such an order had been obtained by fraud or that fresh evidence, not available at the trial or hearing, had since surfaced that may affect the order. To this we like to add another situation where a regularly obtained order can be questioned *ie*, where the order had been entered by consent. Under those circumstances the aggrieved party may institute fresh proceedings to attack the consent order.

In all the instances that we have cited, the normal appeal procedure is dispensed with. See also *Muniandy Thamba Kaundan & Anor v. D&C Bank Bhd & Anor* [1996] 2 CLJ 586 [1996] 1 MLJ 374 and *Craig v. Kanssen* [1943] 1 All ER 108.

That was the situation until 1998 when *Badiaddin*'s case, (*supra*) came to be decided. *Badiaddin*'s case, we say, extended the scope and extent of the inherent and discretionary jurisdiction of a court with unlimited jurisdiction to set aside an earlier order in the following two circumstances:

(1) where the earlier order had contravened a substantive statutory prohibition so as render the earlier order defective on the ground of illegality or lack of jurisdiction and

(2) where in exceptional cases, the justice of the case requires the court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside.

Under the aforesaid circumstances, a court is seised with the necessary jurisdiction to entertain an application to set aside the earlier order *ex debito justitiae*. Expressed in another way there is no need to adopt the appeal procedure nor to file a fresh suit to set aside the defective order. That can be done in the same proceedings where the impeached order was granted and before the same judge or another judge with concurrent jurisdiction.

[6] I further refer to the judgment of Mohd Azmi FCJ in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 where His Lordship held:

It is of course settled law as laid down by the Federal Court in *Hock Hua Bank* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality on lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court ... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.

The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts

> *ex debito justitiae* the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice' ...
>
> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases *involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality* or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.
>
> (emphasis added)

Application To The Facts At Hand

[7] The defendant argues that it is entitled to set aside the consent order on the following grounds:

(i) clause 2 of the judgment contravenes the Moneylenders Act 1951;

(ii) the consent judgment was obtained without the consent of the principal officer of the defendant who was present in court;

(iii) the consent judgment was obtained under duress;

(iv) the consent judgment was obtained by the fraudulent action of the plaintiff;

(v) the alleged conduct of an agent provocateur to stop the defendant from selling the property; and

(vi) the consent judgment was entered despite the alleged change in the legal status of the plaintiff.

Alleged Illegality Of Clause 2 Of The Consent Judgment

[8] The crux of the defendant's allegation lies in the alleged illegality of the original transaction which it says was an illegal money lending transaction.

[9] After having considered the affidavits filed and the submissions filed by the parties, I do not find that the consent judgment falls within any of the categories justifying the setting aside of the said order.

[10] The consent order is a separate agreement agreed upon between parties to settle the dispute pending before court. It is not to be confused with the original agreement and the alleged illegality that allegedly taints the said agreement.

[11] This court cannot go into whether the said original agreement and the transaction entered between parties is illegal or otherwise. That was ultimately settled between parties and the said issue no longer arises. This court also cannot go beyond what has been agreed between parties as it appears in the consent judgment and allow the defendant to reargue the issues that have been settled. That category does not fall under the exceptional circumstances justifying the setting aside of a consent order recognised by our superior courts.

[12] This can be seen in the judgment of Mohd Azmi FCJ in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 where His Lordship stated:

> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, "save that specifically it includes orders that have been obtained in breach of rules of natural justice". Similarly, in this country the statement of Abdoolcader J (as he then was) in *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37 @ 39 provides the correct guideline on the subject:
>
> > The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, 736 Lord Diplock LJ (now a Law Lord) said (at p. 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.
>
> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the Superior Courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened "any written law", the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect. In a final order which has contravened a procedural requirement of any written law. The discretion

to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[13] This also appears in the judgment of Gopal Sri Ram JCA (as he then was) in the same case:

It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until. It is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. *Isaacs v. Robertson* is certainly not authority for the latter proposition. *I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.*

As Abdoolcader J observed when delivering the judgment of the former Federal Court in *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37, 39:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.

In *Harkness v. Bell's Asbestos And Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p. 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'. (emphasis added)

[14] I also refer to *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673 where Abdull Hamid Embong FCJ stated:

[31] It is settled law that the High Court cannot set aside a final judgment/order regularly obtained from another High Court unless the judgment was made in defiance of a substantive statutory prohibition which renders it null and void on the grounds of illegality or lack of jurisdiction. Only in that exceptional case can a defective judgment be struck out *ex debito justitiae*. It is thus only in this situation that a High Court may exercise its inherent jurisdiction to strike out a regularly obtained judgment of another court of concurrent jurisdiction, (see: *Badiaddin*'s case)

A ...

[35] We are thus in agreement with the appellant's stand that an earlier judgment can only be impeached when it is prohibited by statute; and that Badiaddin to us merely reaffirmed that rule and does not extend the inherent jurisdiction of the court to correct a perfected order or judgment beyond any statutory prohibition. This
B *established rule was explained in Tenaga Nasional which we had earlier adverted to. In our view; that part of the holding of the Court of Appeal in Selvam Holdings should not be interpreted as giving the courts a broad power to set aside a previous perfected orders under the guise of "exceptional cases". We think that the Badiaddin's phrase "to intervene and correct a serious defect in the order" should be read in the context of where an order was obtained in a manner which contravened a statute,*
C *resulting in that order being illegal or made outside the jurisdiction of the court. It is in this respect that the court's inherent jurisdiction may be exercised, to strike out an earlier order, ex debito justitiae and without the need for file a fresh suit.*

(emphasis added)

[15] The issue, therefore, is whether the late payment charges that were
D agreed between parties as stated in item 2 of the order and the other terms of the consent judgment are illegal according to ss. 10 and 15 of the Moneylenders Act 1951. Did the terms of the consent order breach the Moneylenders Act 1951 as suggested by the defendant?

[16] I am of the view that the evidence before me does not justify the
E arguments raised by learned counsel for the defendant. The mere fact that parties agreed that the defendant is to pay the sums agreed as late payment charges from December 2017 to July 2022 on the principal sum at 5% per annum amounting to RM380,800 does not mean that the terms of the consent order are illegal. The fact that the parties agreed to the terms of the consent
F order does not prove the existence of any illegal moneylending business as suggested by the defendant.

[17] To fall foul of ss. 10 and 15 of the Moneylenders Act, it must be shown that the said consent judgment constitutes part of a system and continuity in the business of moneylending. The existence of the agreed late
G payment charges on its own as agreed in the consent judgment does not fall foul of the said provisos. Even the existence of interest payable on a principal sum as agreed between the parties in a consent judgment does not automatically mean that there is the existence of a moneylending business despite the invocation of the legal presumption under s. 100A of the
H Moneylenders Act 1951.

[18] I refer to the judgment of the Court of Appeal in *Anuar Abd Aziz v. Dato' John Lee Siew Neng & Ors* [2023] 3 CLJ 159 where the Court of Appeal explained the application of ss. 10 and 15 of the Moneylenders Act. The Court of Appeal also explicitly explained the need to differentiate
I between moneylending *per se*, which is not prohibited under the Moneylenders Act, and the business of moneylending, which requires a license.

[19] Gunalan Muniandy JCA held:

[34] We do not propose to discuss the plethora of authorities on the issue at hand but would stress the importance of differentiating between isolated acts of moneylending and engaging in the business of moneylending as aptly described by Lord Devlin in *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1960] 1 LNS 17; [1962] AC 209 at 218 as follows:

> To lend money is not the same thing as to carry on the business of money-lending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions.

[35] We acknowledge that s. 5 of the MLA 1951 makes it mandatory for a person to be licensed before that person can carry out the "business of moneylending."

[36] While the appellant relied on s. 15 of the MLA 1951, which states "No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable," the respondents brought to our attention the fact that this was however not his pleaded case. It is trite law that a claim can only be determined on matters and issues that are specifically pleaded to support the claim. Importantly, a moneylending agreement as expressly defined in s. 2 of the MLA must be an agreement made in writing. Without proof that R1 and the appellant had entered into an agreement made in writing, s. 15 of the MLA would not afford any assistance to the appellant.

[37] In our considered view, the LJ had adequately and carefully considered the material facts and evidence relevant to the issue at hand when he concluded that the appellant clearly failed to establish that R1:

(i) carried on;

(ii) advertised;

(iii) announced himself as carrying on; or

(iv) held himself out as carrying on a moneylending business within the meaning of s. 5(1) and (2) of the MLA 1951. Without proving this, the appellant's allegation fails – Barisan Tenaga; affirmed by the Court of Appeal in *Dr Mansur Hussain & Ors v. Barisan Tenaga Perancang (M) Sdn Bhd & Ors* [2019] 1 LNS 661.

[20] The same can be seen in *Sureshraj Krishnan v. PV Power Engineering Sdn Bhd & Anor* [2022] 1 LNS 2746.

[21] Therefore, I do not agree that the mere fact that cl. 2 of the consent judgment did contain an agreement to pay late payment charges on the principal sums renders the whole consent judgment illegal according to an alleged contravention of the Moneylenders Act. Otherwise, all consent judgments entered between litigants that contain an agreement to pay interest

for sums outstanding would be illegal. To me, this does not constitute an exceptional circumstance as defined by our esteemed judges as explained in the above-referred cases.

Alleged Fraud Or Deception Or Collusion By The Plaintiff And The Defendant's Previous Lawyers

[22] The other arguments raised by the defendant's counsel concern the alleged shenanigans that were undertaken by the plaintiff and the defendant's lawyers.

[23] The defendant argues that the consent judgment was entered after a secret meeting was held between the plaintiff's counsel and its previous lawyers and allegedly that their representative was either coerced or misled into agreeing to the terms of the consent judgment. There is also an allegation of negligence put forward against the defendant's former solicitors.

[24] This allegation was denied not only by the plaintiff but also by their previous solicitors as seen in the affidavit affirmed by Maha Kalithas a/l Pramasamy.

[25] I am of the opinion that the issues raised by the defendant cannot and should not be resolved by affidavits alone and therefore do not justify setting aside the consent judgment through the notice of applications in encls. 170 and 208.

[26] I refer to the judgment of Wong Kian Kheong JC (as he then was) in *Chow Chuan Fat v. Yeo Chai Seng & Ors* [2016] 1 LNS 1407 where he stated:

> [27] Firstly, I am of the view that if a party relies on the 2nd Vitiating Circumstance (fraud or collusion), the party has to file a Fresh Suit to set aside the perfected judgment or order. This is because the 2nd Vitiating Circumstance cannot be proven by way of affidavit and can only be proven in a trial. I rely on the Federal Court's judgment delivered by Chang Min Tat FJ in *Hock Hua Bank Bhd v. Sahari bin Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143, at 144, as follows:
>
> > *Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order 28 rule 11 Rules of the Supreme Court 1957 (Order 20 rule 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court*: *Re St Nazaire Co* 12 Ch D 88, *Kelsey v. Doune* [1912] 2 KB 482; *Hession v. Jones* [1914] 2 KB 421, *unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment*: *Hip Foong Hong v. Neotia & Co* [1918] AC 888 and *Jonesco v. Beard* [1930] AC 298 ... (emphasis added)

[27] I also refer to the decision of the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1 where Ramly Ali FCJ held:

> [32] The impeachment action must be by way a fresh action, not in the same action where the impugned earlier judgment was made. As early as 1935, Whitley J in the Penang High Court case of *Cheah Wong Nyan and Cheah Sin Kee v. KALRM Palaniappa & Ors* [1934] 1 LNS 10; [1935] 1 MLJ 31, relying on English authorities of *Cole v. Langford* [1898] 2 QB 36; *Priestman v. Thomas* [1884] 9 PD 270; T*he Duches of Kingston's Case* [1776] 2 Smith's LC (13th edn) 644 and *Patch v. Ward* [1867] LR 3 Ch App 203, ruled that, "The court undoubtedly has jurisdiction to set aside a judgment obtained by fraud in a subsequent action brought for that purpose, the proper remedy being an original action and not a re-hearing."
>
> [33] The same principle was adopted by the Federal Court in *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143 where Chang Min Tat FJ ruled that "... if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment ...."
>
> [34] The case of *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346 is a good example involving an action to set aside an earlier judgment of a court on ground of fraud, and the court dealt with it in a full trial, but not in a summary striking out process. In that case, the Court of Appeal stressed on the requirement that the allegation of fraud must be established by evidence, and affirmed that whether the test has been met in any given case must depend on the facts and circumstances of the particular case and evidence needs to be adduced during trial.

[28] I also refer to the recent decision of the Court of Appeal in *David Cheah Seng Chye v. So Miau Song & Ors And Other Appeals* [2023] 5 CLJ 20 where Lim Chong Fong JCA stated:

> [49] Based on the principles distilled from the abovementioned cases, we are of the view that a plaintiff may only initiate a fresh action to impeach a regular judgment earlier obtained in the original action in limited categories of illegality, lack of jurisdiction or fraud.

[29] I am of the opinion that even if these allegations are true, which I am not convinced of at this juncture, I find that these issues should be raised by way of a new action to impeach the said consent judgment. These issues could not be raised solely through affidavits alone. They require oral testimony to explain what transpired between solicitors and the representative of the defendant on the day in question before this court or any court could determine the validity of the allegations. These grounds could only be used successfully to set aside the consent judgment or to impeach it by way of a fresh suit.

[30] Even if I am wrong on the above, I have also considered the contents of the affidavits affirmed by the defendant's representative, one Abhinash Pandeyan, on this issue and find that these allegations at best concerns the conduct of the defendant's solicitors and counsel. This would not taint the consent judgment as it was undertaken independently by the solicitors/ counsel with the defendant's representatives. At best, these allegations point toward an allegation of negligence or misconduct by the defendant's then counsel or solicitors and will not taint the consent judgment.

[31] After all, parties are bound by the conduct of their solicitors as seen in the judgment of James Foong JCA (as he then was) in *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors* [2009] 5 CLJ 1.

[32] To be clear, I am not making any finding that the solicitors or counsel were negligent. That is a matter that could only be decided by court after a claim and a trial are heard. What I am saying is that, these allegations do not justify setting aside the consent judgment as they are issues that should be dealt with independently at a fresh trial between the defendant and his solicitors/counsel.

[33] For the above reasons, I disagree that the defendant has shown sufficient evidence or sufficient grounds to justify the exercise of the inherent powers of the court to set aside the consent judgment.

Alleged Lack Of Consent Or Authority Of The Solicitors

[34] I do not find any merit in the argument as to the alleged lack of consent put forward by the defendant's solicitors.

[35] It is undisputed that the defendant was represented at all material times. The affidavits disclose that the defendant was advised by their chosen solicitors as to the terms of the consent judgment and this was eventually crystallised into a sealed order.

[36] As I have said earlier, whatever transpired between the defendant's representatives and the solicitors does not justify setting aside the consent judgment. That issue does not and should not concern the plaintiff as they were dealing with the defendant's solicitors and are entitled to assume that the said solicitors had ample authority to agree to any terms of the settlement.

[37] I refer to the judgment of Mohd Nazlan J (as he then was) in *Shinning Crest Sdn Bhd & Ors v. Malaysia Building Society Bhd* [2018] 1 LNS 342 where he held:

> [57] On the contrary, it is not an inaccurate a statement to make that it is fairly well settled that lack of mandate of the lawyer is not a valid ground to have a consent judgment set aside. The English Court of Appeal has held to such effect in *Waugh v. HB Clifford & Sons Ltd* [1982] Ch 374, as follows:

> The law has become well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client ...
>
> Thus, counsel's alleged lack of authority is invariably never a ground to set aside a consent order or a contract. Any injustice suffered by the client could be resolved in the context of a claim against his counsel.

[58] Similarly in our jurisdiction, it has been held by the High Court in Lee Teng Siong v. Lee Geok Thye Holdings Sdn Bhd [2003] 4 CLJ 834 that a counsel's lack of mandate would not be a valid ground to set aside a consent order. The following key passages from the judgment of Vincent Ng J are instructive:

> The applicants' complaint of alleged lack of authority of their counsel and solicitor is without substance, as there is no affidavit from their counsel, solicitor, respondent or other contributories as to the lack of or for misapprehension of his authority. (See *Lewis v. Lewis* (890) 45 Ch D 281.) And, the fact that negotiation took place over a period of three days clearly showed that all the contributories had authorised their counsel and solicitor to negotiate and conclude a settlement. Counsel and solicitor in the ordinary course of their retainer have the power to enter into compromise or settle disputes. (See *Sourendra Nath Mitra and Others v. Tarubala Dasi* [1930] 57 Indian Appeals 133 at pp. 138, 139-140, 141, 142 per Lord Atkin; *Teh Eok Kee & Anor v. Tan Chiah Hock & Anor* [1996] 2 CLJ 227.) In the course of his judgment in *Waugh v. H.B. Clifford & Sons Ltd* [1982] Ch. 374, Brightman LJ reviewed a number of the authorities referred to in the foregoing discussion on implied authority and said this (at p. 387):
>
> > The law has become well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matters 'collateral to the action'; and ostensible authority, as between himself and the opposing litigant to compromise the suit without actual proof of authority, subject to the same limitation ...
>
> *Thus, counsel's alleged lack of authority is invariably never a ground to set aside a consent order or a contract. Any injustice suffered by the client could be resolved in the context of a claim against his counsel. (See Waugh v. H.B. Clifford & Sons Ltd (supra); Leow Seng Huat v. Low Mui Yein [1996] 2 BLJ 466.) There is no obligation to prove express authority. A solicitor or counsel by implication had authority to compromise. The petitioner and the court, are entitled to assume the existence of authority when the lack of authority is not specifically brought to the attention of the petitioner or the court at that material time.*

[59] As such, in the instant case, the plaintiffs' assertion concerning their former solicitors' lack of authority in entering into the consent judgment must fail. In addition, if the plaintiffs genuinely have a gripe against their

A former solicitors, it is for them to take it up with their former solicitors; for it cannot validly form a premise for the setting aside of the consent judgment. And neither, in any event, is there any affidavit or any form of confirmation from the former solicitors of the plaintiffs forthcoming on the question of whether they were properly authorized to agree to the terms of the consent judgment. (emphasis added)

B

[38] As such, I opine that this argument of an alleged lack of consent of the defendant's representative is untenable to justify setting aside the consent judgment.

[39] If there are any complaints against the firm and counsel, it is for the C defendant to institute a fresh action against them for negligence. The consent judgment remains valid as the defendant's solicitors had ostensible authority to bind his client. More so in this case, when the said solicitors have affirmed an affidavit to deny these allegations. These are matters that are best left to be decided in a fresh proceeding, if any are filed, between them.

D *Alleged Agent Provocateur Stopping The Alleged Sale Of The Property Or Delaying The Sale Of The Property*

[40] On the issue of the alleged agent provocateur, I find that this is an issue that falls outside the ambit of the circumstances justifying the setting aside of the consent judgment.

E

[41] I also do not find any evidence to support the contention that the plaintiff had any connection or relation to the said alleged agent provocateur or proposed purchasers of the property. No form of estoppel arises despite whatever suggestions or advice given by the new solicitors for the defendant, F Mr Andrew Sewell. This contention is not substantiated by any legal principles and by the facts as shown in the affidavits.

[42] I find that these are mere excuses made up by the defendant to justify not complying with the terms of the consent judgment and to justify setting aside the same. These excuses are not supported by any evidence and do not G fall within the exceptional circumstances justifying the exercise of the powers of this court to set aside a sealed consent judgment agreed upon between the parties.

[43] For the above reasons, I dismiss the defendant's applications in encls. 170 and 208 with costs.

H

Application To Expunge The Affidavit Affirmed By Maha Kalithas Pramasamy Affirmed On 4 October 2022 In Enclosure 181

[44] After considering the affidavits and the submissions filed by the defendant, I opine that the said affidavit is a relevant document that should I be admitted into evidence to consider encl. 170 and encl. 208 filed to set aside the consent judgment.

[45] As an advocate and solicitor of the High Court, the deponent has a duty to the court to inform what transpired at the time when the consent judgment was entered. The contents of the affidavit did not contain any privileged information and only answers the averments and allegations made against his firm and counsel attending. He has a right to defend himself and his firm against these allegations.

[46] Therefore, I do not find any reason to expunge the said affidavit and do not fall under any of the categories recognised under O. 41 r. 6 of the Rules of Court 2012.

[47] To be explicitly clear, I do not find that affidavit contains any matters that are either scandalous, irrelevant, or oppressive. The contents of the complained affidavit only touch on issues that have been raised by the defendant and the new solicitors. The said firm and Mr Maha Kalithas are entitled to rebut these allegations as former solicitors for the defendant and as officers of this court.

[48] For the above reasons, I dismiss the defendant's application with costs.

Application To Stay Enforcement Of The Consent Judgment Dated 18 July 2022 In Enclosure 171

[49] I have considered the defendant's application for the stay of the execution of the consent judgment. I do not find any basis for the same.

[50] At this juncture, the two applications to set aside the consent judgment have been unsuccessful and there is no pending appeal against the said consent judgment.

[51] There are also no special circumstances shown by the defendant to stay the orders that have been agreed upon. The only issue shown by the defendant is the difficulty faced by it in selling the property and the same issues raised in encl. 170.

[52] These are not special circumstances that justify the stay of the orders of the court. The said application in encl. 171 is dismissed with costs.

Orders Of This Court

[53] For the above reasons, I dismiss the defendant's applications in encls. 170, 171, 181 and 208 with costs of RM15,000 to be paid each to the plaintiff's solicitors and the solicitors of the second defendant subject to allocator.